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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1252

DONOVAN CONSTRUCTION COMPANY
OF MINNESOTA,

Petitioner,

vs.

FLORIDA TELEPHONE CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Janis Mary Halker
501 Park Avenue North
Winter Park, Florida 32789
(305) 645-1670

J. Thomas Gurney
J. Thomas Gurney, Jr.
Leon H. Handley
203 North Magnolia Avenue
Orlando, Florida 32802
(305) 843-9500

Counsel for Respondent
Florida Telephone Corporation

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Respondent, Florida Telephone Corporation, opposes the Petition for A Writ of Certiorari and respectfully requests that review of the *per curiam* decision of the Court of Appeals for the Fifth Circuit of December 22, 1977 be denied.

I
QUESTION PRESENTED

Whether Petitioner has standing to sue Respondent for treble damages under Section 4 of the Clayton Act for an alleged violation of Section 2 of the Sherman Act where at the time of the alleged violation Petitioner neither dealt nor intended to deal in the market it claims was threatened.

II
STATEMENT OF THE CASE

Florida Telephone Corporation (''FTC'') is a public telephone utility that provides telephone service in a central Florida area by virtue of a Certificate of Public Convenience and Necessity issued by the Florida Public Service Commission, which regulates FTC's activities. (A-2, 4).

Between 1969 and 1972 the massive Walt Disney World project in the Orlando, Florida area was being built. (A-7). For many years prior to this time, FTC was a relatively small telephone company which rendered service primarily in rural areas in its 6,000 square mile operating territory in central Florida (A-2,5). As a result of the Walt Disney World construction, FTC's business increased so dramatically that its regular work force of telephone installers and splicers was unable to accommodate the demand (A-7). To fill this labor gap, FTC engaged a number of independent contractors who provided skilled craftsmen to perform installation and splicing services supplementary to FTC's regular work force (A-7).

Donovan Construction Company of Minnesota (''Donovan'') engages in many businesses and is one of the

independent contractors FTC hired in mid-1969 to perform installation and splicing services in FTC's operating territory to enable FTC to satisfy the increased demand for telephone service (A-1-2,7, 22). The arrangement between Donovan and FTC as to the number of craftsmen to be provided and the charges for Donovan's services varied as FTC's needs fluctuated and Donovan's fees changed (A-7).

Incidental to providing telephone service in its geographic region, FTC sells terminal telephone equipment to its non-residential customers in that region (A-7, 22). In December of 1971, Donovan decided to expand its already diversified business activities to include the sale and leasing of terminal telephone equipment (A-7). However, Donovan's entry into the terminal telephone equipment market, often referred to as the ''interconnect business'', was in a geographical region of Florida beyond FTC's operating territory, served by another telephone company, General Telephone Corporation (A-7, 22).

In March of 1972, FTC terminated its arrangement with Donovan for installation and splicing services (A-7-8). The evidence as to the reason for this termination substantially conflicted (A-7-8). Donovan claimed FTC terminated the arrangement because of Donovan's decision to enter the interconnect business in another region of Florida (A-7-8, 22). FTC asserted Donovan was terminated for business reasons (A-7-8). Although the evidence conflicted as to why Donovan's installation and splicing services were terminated, and the District Court did not resolve this fact

issue,[1] the undisputed evidence and Donovan's own representations to the District Court established that at the time of the termination, Donovan had not entered the interconnect business in FTC's operating territory and did not intend to do so (A-7, 15, 22-23).[2]

Donovan claimed the right to treble damage recovery under Section 4 of the Clayton Act, 15 U.S.C. §15 on the theory that FTC had monopolized or attempted to monopolize the interconnect business in FTC's region in violation of Section 2 of the Sherman Act, 15 U.S.C. §2 (A-11-12, 22). The claimed injury is the termination of Donovan's installation and splicing services (A-15, 22).

The District Court held that because Donovan neither dealt nor intended to deal in the interconnect business in FTC's region, Donovan failed to establish the termination of its installation and splicing services was the type of injury Section 2 of the Sherman Act was intended to prevent, since the termination did not and could not have any effect upon competition in the interconnect business in FTC's region (A-11-20). The Court of Appeals held that the fact that Donovan did not deal or intend to deal in the interconnect business in FTC's region deprived Donovan of standing to seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. §15 (A-22-23).

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1 Since the District Court held resolution of this fact was unnecessary to its decision, we think Petitioner's representation in its brief as to the weight of the evidence, i.e., that FTC's evidence was "completely discredited" (Br. 8) is inappropriate here.

2 Following the termination, however, Donovan did begin selling interconnect systems in FTC's region, (P.Ex. 28). Other companies with whom FTC dealt and continues to deal for services also sell terminal equipment in FTC's region. (R-481-482, 486, 509-510).

III
REASONS FOR DENYING REVIEW

Under Any Test Of Antitrust Standing, One Who Neither Dealt Nor Intended To Deal In The Area Of The Economy Threatened By An Alleged Antitrust Violation Lacks Standing To Sue For Treble Damages Under Section 4 Of The Clayton Act.

Based on the evidence and Donovan's representations, the District Court found that when FTC terminated the arrangement for installation and splicing services, Donovan had not entered the interconnect business in FTC's operating territory and did not intend to do so (A-7, 15). On these findings, which Donovan does not dispute, the Court of Appeals held Donovan lacked standing because the claimed antitrust violation, i.e., that FTC monopolized or attempted to monopolize the interconnect business in FTC's region, occurred in a market in which Donovan neither dealt nor intended to deal. (A-22-23).

The question of standing under Section 4 of the Clayton Act, 15 U.S.C. §15, concerns a plaintiff's right to seek damages for a particular injury and is a question of law. *In Re Western Asphalt Cases*, 487 F. 2d 191 (9th Cir. 1973), *overruled on other grounds, Illinois Brick Co. vs. Illinois*, ___U.S___, 97 S. Ct. 2061 (1977). In *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court denied a treble damage recovery under §4 where the injury for which the remedy was sought was not "of the type the antitrust laws were intended to prevent. . ." The antitrust charge in this case was the monopolization or attempted

monopolization of the interconnect business in FTC's region in violation of Section 2 of the Sherman Act, 15 U.S.C. §2. The purpose of Section 2 is to prohibit use of monopoly power that is likely to injure competition by adversely affecting the ability of persons who desire to enter a particular area of the economy to compete. *United States v. Colgate*, 250 U.S. 300 (1919); *United States v. Griffith*, 334 U.S. 100 (1948). The antitrust laws generally are designed to protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, (1962).

Although private actions under Section 4 of the Clayton Act, 15 U.S.C. §15, have the effect of punishing antitrust violators, *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); Section 4 is primarily intended to provide a remedy for redress of injuries sustained by plaintiffs "by reason of" anti-competitive conduct. *Brunswick v. Pueblo Bowl-O-Mat, Inc., supra.*

In *Brunswick*, this Court denied treble damage recovery under Section 4 to plaintiffs who claimed injury as the result of a violation of the anti-merger provisions of Section 7 of the Clayton Act, 15 U.S.C. §18. Plaintiffs contended Defendant's "deep pocket" acquisitions of failing bowling centers substantially lessened competition and tended to create a monopoly. But for these unlawful acquisitions, plaintiffs asserted, the acquired centers would have closed and plaintiffs' profits would have increased. This Court held plaintiffs were not entitled to recover damages for this type of injury because although the loss resulted "by reason of" the unlawful acquisitions, it did not result "by reason of" that which made the acquisitions unlawful - defendant's size as a "giant" in a "market of pygmies" which might lessen

horizontal retail competition. The damages claimed by plaintiffs occurred because defendant's acquisitions had the effect of *preserving* competition rather than lessening competition. Thus, the damages claimed were not related to any purpose to be served by the antitrust laws.

The decision below is consistent with the principles governing the right to seek treble damages under Section 4 articulated in *Brunswick, supra*. In this case, as in *Brunswick*, the damages claimed are unrelated to any purpose for which the antitrust laws were enacted. The termination of Donovan's installation and splicing services could have no effect upon Donovan's ability to compete in the interconnect business in FTC's region where Donovan had not entered that market and did not intend to enter that market at the time. While Donovan claims FTC acted with the intent to preserve a monopolistic position in the interconnect business in its region, the damages claimed cannot logically be related to the purpose of Section 2 of the Sherman Act where Donovan did not even deal or intend to deal in the market it claimed was threatened. Under *Brunswick*, the absence of any impact on competition by reason of FTC's acts precludes recovery of the damages Donovan claims.

Brunswick has been read to mean that the failure to prove injury to competition deprives a plaintiff of standing to seek treble damages under Section 4. *Illinois Brick Co. v. Illinois*, ___U.S.___, 97 S.Ct. 2061, 2082 n.18 (1977) (dissenting opinion of Mr. Justice Brennan); *N.A.A.C.P. v. New York Clearing House Ass'n*, 431 F. Supp. 405 (S.D.N.Y. 1977); *John Lenore & Co. v. Olympia*, 550 F. 2d 495 (9th Cir. 1977). That decision resolves the question presented in this case, and for that reason, review should be denied. As in

Brunswick, the antitrust violation alleged here did not adversely affect competition and conversely, the damages sought were not sustained "by reason of" that which it is claimed made FTC's termination unlawful, because Donovan was not in the area of the economy allegedly threatened.

Although it is unnecessary to look beyond the basic guidelines articulated in *Brunswick* to determine Donovan lacks standing in this case, application of the various standing "tests" Donovan asserts are in conflict defeats Donovan's right to sue for treble damages under Section 4 of the Clayton Act.

Donovan does not appear to challenge the correctness of results reached by the courts below if either the so-called "direct injury" test or the "target area" test is applied to the facts. The "target area" test is a liberal one that only requires, in addition to causation, that the plaintiff be within the sector of the economy in which the antitrust violation threatens a breakdown in competitive conditions. *Battle v. Liberty National Life Insurance Co.*, 493 F. 2d 39 (5th Cir. 1974; *Southern Concrete Co. v. U.S. Steel Corp.*, 535 F. 2d 313 (5th Cir. 1976). Standing under the "target area" test is conferred if the plaintiff's injury is a reasonably forseeable consequence of the antitrust activity alleged. *Mulvey v. Samuel Goldwyn Productions*, 433 F. 2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). It is therefore consistent with, and certainly not more restrictive than the holding of this Court in *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), that the loss for which damages are sought must be of the type the particular violation would likely cause. *See also Zenith Radic Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969). Clearly Donovan, who had not

entered and did not intend to enter the interconnect business in FTC's region, the market it claimed was threatened, lacks standing under the "target area" test.

The "direct injury" test, generally regarded as the most restrictive, *see* e.g. *Illinois Brick Co. v. Illinois*,___U.S. ____, 97 S. Ct. 2061, 2082 (1977) (dissenting opinion of Mr. Justice Brennan) centers on a determination of whether the particular injury sustained is the direct result of the alleged violation. *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910). Since Donovan was not even engaged in the interconnect business in FTC's operating territory, its "injury" cannot be deemed anything but incidental or consequential in terms of the antitrust violation claimed, which related only to a threatened breakdown in competition in the interconnect business in FTC's region.

Neither of the other two tests that Donovan urges establishes a conflict of decisions would support a determination of standing in this case. The "zone of interests" test articulated in *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150 (1970) and applied to a Section 4 treble damage action in *Malamud v. Sinclair Oil Corporation*, 521 F. 2d 1142 (6th Cir. 1975) requires, in addition to the fact of some injury, that the interest plaintiff seeks to protect is within the zone of interests to be protected or regulated by the statute involved, in this case, Section 2 of the Sherman Act. Since Donovan did not deal or intend to deal in the interconnect business in FTC's region, it could not have been seeking to protect an interest in preserving competition in that market. The interest for which Donovan seeks protection is its interest in continuing to supply FTC with installation and splicing services, as it had no interest in preserving

competition in the interconnect business in FTC's region where it had not and did not intend to engage in that business. By contrast, the interests sought to be protected by the plaintiffs in *Malamud v. Sinclair Oil Corporation, supra*, were the expansion of their business by the acquisition and development of additional service station sites which the defendant allegedly prevented by refusing to assist the plaintiffs pursuant to a financing agreement among the parties.

What Donovan labels the "entire factual matrix" test is simply a phrase that describes an analytical approach to Section 4 standing questions intended to ultimately resolve whether the "plaintiff is one 'whose protection is the fundamental purpose of the antitrust laws.' " *Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F. 2d 501, 506 (3d Cir. 1976). Among the factors that are considered in implementing this approach is the position occupied by the plaintiff "in the area of the economy threatened by the alleged anticompetitive acts. . ." *Bravman v. Bassett Furn. Industries, Inc.*, 552 F. 2d 90, 99-100 (3d Cir. 1977). In *Bravman*, standing was found to exist where an exclusive dealing requirement and territorial limitation imposed by furniture manufacturers prevented the plaintiff, a furniture manufacturer's representative, both from competing with other manufacturers' sales representatives and from representing other furniture manufacturers. Unlike the plaintiff in *Bravman*, Donovan occupied no position at all in the area of the economy threatened by the claimed antitrust violation.

Since Donovan cannot meet any of the standing tests, even if the Courts of Appeals apply different criteria in determining §4 standing questions, in the context of this

case, review of those "tests" would be a purely academic exercise. Review should accordingly be denied.

IV
CONCLUSION

The Fifth Circuit's decision in this case is consistent with this Court's decision in *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) which limits treble damage recoveries to those plaintiffs who have sustained damages by reason of claimed anti-competitive conduct that would likely harm competition. Donovan cannot claim the termination of its installation and splicing services affected its ability to compete because it did not enter and did not intend to enter the interconnect business in FTC's region. Thus, Donovan lacks standing under any test, because the termination of its services is not the kind of injury the antitrust laws were intended to prevent.

For these reasons, FTC respectfully requests that the Petition for a Writ of Certiorari be denied.

Janis Mary Halker
501 Park Avenue North
Winter Park, Florida 32789
(305) 645-1670

J. Thomas Gurney
J. Thomas Gurney, Jr.
Leon H. Handley
203 North Magnolia Avenue
Orlando, Florida 32802
(305) 843-9500
Counsel for Respondent
Florida Telephone Corporation

V.
CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of Respondent's Brief in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit and appendix thereto were furnished by United States mail, first class postage prepaid, this 11th day of April, 1978 to Jerome B. Simon and James A. Gallagher, 332 Hamm Building, Saint Paul, Minnesota 55102.

Janis Mary Halker
501 Park Avenue North
Winter Park, Florida 32789
(305) 645-1670
Counsel for Respondent
Florida Telephone Corporation

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Civil Action No. 72-733 T-K

DONOVAN CONSTRUCTION COMPANY
OF MINNESOTA, a Corporation,
Plaintiff

v.

FLORIDA TELEPHONE CORPORATION,
Defendant.

OPINION

MILLER, J.
Sitting by Assignment.

Donovan Construction Company (Donovan) brings this action against the Florida Telephone Corporation (FTC)[1] contending that the latter's termination of business dealings with the former violates sections 1 and 2 of the Serman Antitrust Act. The Suit, being bifurcated by order of March 14, 1975, was tried non-jury as to liability. After thorough review of the record and the law applicable to this case, it is our opinion that judgment should be entered for defendant.

FACTS

Donovan, a Minnesota Corporation and subsidiary of Donovan Companies, Inc., is a multi-business entity which

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1 General Telephone Company of Florida was also originally named a defendant but has since been dismissed as a party.

engages in various types of construction work. Two of Donovan's business endeavors, which involve electrical construction and selling telephone equipment and service, are germane to this litigation.

FTC is a telephone company which conducts business pursuant to a Certificate of Public Convenience and Necessity issued by the Florida Public Service Commission (FPSC)2. FTC serves a central geographic region of Florida covering some nine counties and 6,000 square miles.[3] It is headquartered in Ocala and has additional offices in Leesburg, Florida. FTC provides local service within its operating territory and long distance service outside its territory through its interconnection with the facilities of other telephone companies throughout the United States.

General Telephone Company of Florida (GTF) is a telephone company operating under a Certificate of Public Convenience and Necessity. It too serves a central but different geographic region of Florida[4] and provides both local and long distance (through interconnection) service to its customers.

To properly understand Donovan's theories of liability it is necessary to summarize certain background information pertinent to the telecommunications industry.

Industry Change

American Telephone and Telegraph Company (A T & T), through its many holdings, provides the largest network of telecommunications in the country. Either directly or through the use of interconnection, A T & T provides long distance service in the United States and throughout the

2 *See* Plaintiff's Exhibit (PX) No. 1.
3 *See* PX No. 2.
4 *Id.*

world. Domestic telephone service is of course supplemented by many independent telephone companies (non-A T & T affiliated) such as GTF and FTC and the entire network is statutorily regulated by the Federal Communications Commission (FCC).[5] Under statutory mandate telephone companies are required to file tariffs with the FCC showing service charges and the classifications, practices, and regulations justifying those charges.

Over the years telephone companies—whether A T & T controlled, Bell System operated or independent—have refused to connect privately-owned telephone equipment with their facilities, the reasons for which are many and diverse. As noted by an FCC Hearing Examiner:

> The telephone companies historically have opposed interconnection. They have contended that they are now solely responsible for the quality of telephone service, and, if interconnection were to place a portion of the communications path beyond their authority, they could no longer accept responsibility for the quality of communication. They have further contended that such divided control would hamper innovation and increase the cost to the public of basic telephone service. For these reasons the telephone companies have opposed the use of interconnection devices, including the Carterphone.[6]

5 *See* 47 U.S.C. section 151 *et seq.*
6 *In re Use of the Carterphone Service in Message Toll Telephone Service*, 13 F.C.C. 2d 430, 439 (Aug. 30, 1967. A copy of this decision, which found existing tariff regulations that allowed phone companies to resist interconnection to be unlawful, has been introduced in evidence as PX No. 6.

At any rate, for reasons not here particularly pertinent, the death knell for this industry-wide resistance was sounded on June 26, 1968 when the FCC, in sustaining the Hearing Examiner, held that the tariff regulations which prohibited use of interconnection devices were unlawful.[7]

Accordingly, a new branch of the telecommunications industry had been created and private companies were soon to assume a new competitive stance in this field. That is, through *interconnection* with the equipment operated by the already established telephone companies, they began to sell and lease their own telephone equipment. In short, the stage was set for private concerns to compete with the telephone "establishment".

Resistance

The FPSC regulates the telephone industry in Florida. Being comparable to the FCC insofar as setting requirements for members of the industry within its jurisdiction, the FPSC likewise required telephone companies to file tariffs which show rates, charges, contracts and regulations that apply to services rendered and equipment supplied by them. We do not believe it is necessary to detail the relevant events subsequent to the *Carterphone* decision which bear on FTC's reaction to it. Suffice it to say that FTC was aware of and, like most of the established telephone companies, hostile to it. Moreover, FTC was one of the last Florida companies to modify its tariffs to allow for interconnection of privately owned

7 *In re Use of the Carterphone Device in Message Toll Telephone Service*, 13 F.C.C. 2d 420 (June 26, 1968) (PX No. 7), *petition for reconsideration denied*, 14 F.C.C. 2d 571 (September 11, 1968).

equipment, this being done in December of 1971.[8] Because of the certificate issued by the FPSC, FTC had a lawful monopoly on the telephone service within its operating territory. Subsequent to the Carterphone decision it continued to dominate the terminal telephone equipment market in its geographic region at times pertinent to the events which fostered this controversy. Before describing those events we believe a brief look at the parties' organizational structure is in order.

Corporate Background

FTC, which was founded by Otto Wettstein, Jr. during the twenties, has been over the years a phone company of modest dimension. Operating for the most part in rural areas the company underwent no significant changes, except for steady growth, until Max E. Wettstein replaced his founding father as President. Mr. Wettstein is presently Chairman of the Board. The most important man, however, as respects this litigation is Mr. Claude E. Locke, FTC's Vice President of Operations. Mr. Locke had responsibility for all operations relating to commercial service; *ie.*, construction, installation and maintenance of all outside facilities including cables, poles, wire and all telephone and other terminal equipment owned by FTC. Donovan provided skilled contract labor to FTC for this phase of defendant's operations.

While the outside plant superintendent (O.P.S.) played an important role in FTC's dealings with independent contractors—*e.g.* retaining their services, negotiating rates, *etc.*—it was Locke who possessed ultimate authority

8 Actually such revision was prompted by a hotel association's filing a petition with the FPSC which charged that FTC's extant tariff was deficient for not reasonably accomodating interconnection of privately owned or leased equipment.

in approving the O.P.S's recommendations. In short it was Locke from whom company policy could be fashioned.

While many of Donovan's diversified business interests were controlled by its President, Mr. John Donovan, direct supervision over telephone construction work rested with Mr. S. V. Christenson, Vice President. Accounting to him was Mr. Robert Berroyer, who managed this particular phase in the Florida area; actually, Berroyer was the local representative with authority. In turn he was assisted by a field superintendent for the FTC area. This superintendent's principal job was to coordinate the supply of Donovan personnel with FTC's demand on a daily basis.

Electrical Construction Market

As noted earlier only two aspects of Donovan's many diversified business operations pertain to this lawsuit: (1) the telephone terminal service business (terminal equipment market) spawned by *Carterphone* which we shall discuss later, and (2) electrical construction (construction market) as it pertains to telephone installation and maintenance on a system-wide scale. The latter enterprise consisted of providing skilled services necessary for the installation of telephone service to customers of the various telephone companies that contracted with Donovan. It is this end of the Donovan business which was terminated by FTC.

Between June of 1969 and March of 1972—the date of termination—Donovan supplied FTC with craftsmen, *ie.*, splicers and installers, and equipment. Similar contract labor was also supplied to GTF. Much of the work involved setting up telephone switching equipment and installing of cable.[9] With the sharp upsurge of FTC's business, given

9 For a detailed account of what services and supplies Donovan's craftsmen provided, *see* Tr. 44-6, 457.

monumental impetus by the Walt Disney World complex then under construction near Orlando, it was just not possible for FTC's work force to handle the necessary construction. Thus, FTC sought independent contractors such as Donovan, Hoyt-Edwards Company, and Burnup & Simms Company, to supplement its regular labor force, as did other telephone companies experiencing similar business demands. In hiring such contractors it appears to have been the established practice of FTC to execute a letter agreement which was modified from time to time as FTC's demands fluctuated and/or Donovan's service charges changed.[10] Under this agreement Donovan provided FTC with construction service until March of 1972 when the termination was effected.

Telephone Terminal Equipment Market

Donovan made the decision to enter the telephone service business, and thus become a potential competitor of FTC, in December of 1971. This new venture operated under the name Independent Business Telephones but provided its services solely in the Tampa area which is beyond FTC's operating territory; thus, it had not entered FTC's geographic market. In fact, as will be discussed later, Donovan had no intention of competing with FTC. This part of plaintiff's business consisted of selling and leasing telephone equipment which included, *inter alia*, automatic branch exchange and key telephone systems sold by FTC and GTF.

The Termination

For reasons that will be stated, we believe the parties placed undue importance on this part of the case. Donovan contends that its construction services were terminated

10 *See e.g.*, PX Nos. 10-14.

because of its decision to enter the telephone business which made it a potential competitor in FTC's terminal equipment market. FTC maintains that Donovan was let go for business reasons.

On March 3, 1972 FTC began to terminate Donovan's construction service when twenty men were let go. On March 10 twenty-six had been similarly notified and those remaining (twenty-eight) were discharged on March 17. In much the same fashion—summarily, that is—GTF terminated Donovan on February 18, 1972. Berroyer first contacted the O.P.S. on March 7 to inquire about the termination and, subsequently, notified Christenson of this development who in turn apprised Mr. Donovan.

A series of telephone conversations and a meeting (on March 24) between Berroyer, Christenson and Locke followed. What exactly was said during these events is in dispute[11] and, not surprisingly, is crucial to determining *why* FTC ceased doing business with Donovan. However, after careful consideration of all the facts presented and in view of the law we believe controlling in this matter, the Court need not decide this disputed issue of fact. Under undisputed facts on the record plaintiff cannot recover as a matter of law.

DISCUSSION

Donovan proceeds under the conspiracy and monopoly

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11 The testimony of Wettstein and Locke significantly differs from that of Donovan, Christenson and Berroyer.

sections of the Sherman Act.[12] We shall discuss each theory of liability separately.

Conspiracy

Conspiracies or combinations in restraint of trade clearly are illegal under §1 so long as there is shown to be a plurality of actors who acted in concert for an unlawful purpose. *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.* 346 U.S. 537 (1954); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). Within the context of this case we note that *concerted* refusals to deal have been deemed violations of §1 when their objectives have been to keep new competition out of a market, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); to create a monopoly in a relevant product market, *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); or to maintain extant market control, *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927.

Examination of the evidence leads this Court to conclude that the §1 claims must fail because Donovan failed to prove either of two alleged conspiracies. Plaintiff theorizes that FTC conspired with GTF to restrain trade in (and monopolize) one line of commerce (the terminal equipment market) while FTC combined with Hoyt Edwards to restrain

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12 15 U.S.C. §1 provides in pertinent part:

> Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

15 U.S.C. §2 provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty . . .

trade in another line of commerce (the construction market). While plaintiff admitted, during oral argument, that the proof on either score was rather weak the assertion nevertheless surfaces that inferences can be drawn from the evidence—all of it circumstantial—to support a finding favorable to it on a conspiracy theory.

Except for the fact that both GTF and FTC terminated plaintiff within one month, there is not any proof on this record that they acted in concert. Similarly the facts with regard to Hoyt Edwards are skimpy. A mere showing that many of Donovan's workers almost immediately found the same kind of employment with Hoyt Edwards is insufficient for this Court to infer that it conspired with FTC to eliminate plaintiff, a supplier of cable splicers and installers, as a competitor of Hoyt Edwards.13

Reliance for plaintiff's position is placed on *Interstate Circuit, Inc., v. United States,* 306 U.S. 208 (1939). While a conspiracy can be inferred from a similar and compatible course of conduct we nonetheless believe plaintiff's proof falls short of the mark. We note that in *Interstate Circuit* the defendant did not deny complicity in the illegal agreement. Here FTC denies any mutual involvement with GTC or Hoyt Edwards in deciding to terminate Donovan. Moreover, since conscious parallel business behavior does not conclusively establish an illegal agreement under §1, it is for the fact finder to determine the existence of a conspiracy. *See Theater Enterprises, Inc., v. Paramount Film Distributing*

13 Moreover, the Court fails to see how such an agreement would benefit FTC since it would be to defendant's economic advantage to deal with three independent contractors instead of two. This observation is illuminated by the fact that Hoyt Edwards' rates *increased* after Donovan was discharged as a supplier of construction labor.

Corp., supra at 541. Judgment shall therefore be granted for defendant on the §1 conspiracy claims.

*Monopoly*14

We now come to the delicate legal issue raised by this proceeding, to wit: Does a monopolist, in terminating business dealings with a potential competitor, *for whatever reasons,* violate §2 of the Sherman Act when the refusal to deal has no effect on the relevant market? The answer to this question is no.

We believe part of Donovan's difficulty lies in its designation of *what market* is relevant to the §2 claims being advanced here.15 Any plaintiff, of course, must establish the relevant product and geographic markets in a §2 monopolization case. The product market circumscribes the commodity or service in which the parties compete (potentially here) while the geographic market merely delimits the territory in which such competition exists. *United States v. du Pont & Co.,* 351 U.S. 377 (1956). In this case we know that the relevant product market involves terminal business telephone equipment. The relevant geographic market is confined to FTC's franchised

14 For the reasons stated earlier we shall not address the "conspiracy to monopolize claim" being asserted by Donovan under §2.

15 On brief Donovan seems to attach importance to the "construction" market in which it competed with two other labor contractors. However, foreclosing plaintiff from participation in that market, while it does show harm in the form of lost revenue [every refusal to deal will arguably cause pecuniary loss, *see e.g., Burdett Sound, Inc. v. Altec Corp.,* 515 F. 2d 1245 (5 Cir. 1975).] was *not* the reason claimed nor proved to be responsible for the termination. The damaging results or potential results must be linked to the market in which the monopolist seeks to preserve. *See* discussion at pp. 13-17, *infra.*

operating area.

Monopoly power is also a necessary predicate to sustaining a charge of monopolization. *United States v. Grinnell Corp.*, 348 U.S. 563 (1966). FTC, being a public utility and regulated by the FPSC, has a legally-sanctioned monopoly on marketing terminal business telephone equipment in its territory. This is not to say, however, that FTC wields monopoly power.

Admittedly, the record indicates that FTC possessed over a 90% share of this market at times material to this litigation and such an amount is sufficient to infer monopoly power, *see e.g., United States v. Grinnell Corp., supra; United States v. Aluminum Co. of America*, 148 F. 2d 416 (2 Cir. 1945), in an appropriate case. Such numerical determinations are only reliable when the facts do not provide us with information to reconcile one's position in the relevant market with the more basic definition of monopoly power, *ie.*, "the power to control prices or exclude competition." *du Ponte, supra* at 391.

While an unfriendly motive coupled with ostensible market power more often than not results in anticompetitive conduct, those factors cannot be perfunctorily read to mean a §2 violation has been committed. We believe a close look at the facts and law is necessary to reach the correct result. Our concern for detail is sharpened by the following Supreme Court passage found in *United States v. Griffith*, 334 U.S. 100, 106-07 (1948):

> Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether

> lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under §2 even though it remains unexercised. For §2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control. * * * Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power. * * * It is indeed "unreasonable, *per se*, to foreclose competitors from any substantial market." * * * The anti-trust laws are as much violated by the prevention of competition as by its destruction. * * * It follows *a fortiori* that the *use of monopoly power*, however lawfully acquired, to *foreclose competition*, to *gain* a competitive advantage, or to *destroy* a competitor, is unlawful. (Emphasis added.) (Citations omitted.) (Footnotes omitted.)

We also must view FTC's actions in the context of an "attempt to monopolize" charge under §2 Sherman. That is to say, if FTC's refusal to deal with Donovan did not actually constitute an act in furtherance of monopoly extant, did such conduct amount to an *attempt* to achieve monopoly in the relevant terminal equipment market. In *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) the Supreme Court stated:

> The phrase "attempt to monopolize" means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it . . . .

Thus, it would seem that for a violation of this provision of §2, one must show that the "attempt" results in monopoly

achievement or comes precariously close to succeeding. Since FTC had a natural monopoly on the relevant market before Donovan's termination one might suggest that an "attempt" claim is inapplicable here. However, if specific intent is present certain conduct can be violatory where the primary objective is to build monopoly or destroy competition. *See Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

In our analysis of this case plaintiff has not established a violation under either provision of §2

First of all we are dealing with a defendant that provides a regulated service. Much if not all of what FTC could do was dictated by the regulating agency. While FTC certainly had a monopoly on providing terminal equipment in its authorized operating territory, it could not unilaterally or in discretionary fashion control prices. And under the facts as they pertain to Donovan,[16] it could not be said *in vacuo* that FTC had the power to exclude competition in its terminal equipment market. Theoretically *Carterphone*, in mandating the use of interconnection as the means by which private newcomers to the industry could gain access to the establishment-integrated network—and thus be put in a position to compete in the equipment markets—, compels this conclusion. Realistically, of course, one can envision ways in which FTC might use its monopolistic position to foreclose or impede such competition; however, such uses of monopoly power have not been shown here. To be sure it is the *use* of monopoly power that triggers a §2 charge and we fail to perceive how that prerequisite to recovery can be

16 Every antitrust case must turn upon its own facts. *Maple Flooring Mfg. Ass'n. v. United States*, 268 U.S. 563 (1925).

equated with the refusal to deal *sub judice*. In other words Donovan has not shown that FTC's rejection of its electrical construction services caused Donovan to be hindered in competing with defendant in its terminal equipment market.

Since a unilateral refusal to deal with anyone is legitimate activity so long as such refusal is not made to create or maintain a monopoly, *see United States v. Colgate & Co.*, 250 U.S. 300 (1919), it only seems logical to ascertain the results of the action taken by the monopolist.

As will shortly be seen the inquiry here is directly related to the prior discussion of monopoly power. And again we are troubled by the fact that FTC's assailed conduct did not have any discernible anticompetitive effect on the relevant market in which Donovan had become a potential entrant. Except for the testimony of plaintiff's President which indicates Donovan lost "substantial" income from the termination,[17] there is nothing in the record to suggest that plaintiff was "destroyed", "precluded", or even hampered in an effort to enter the terminal business telephone market in FTC's territory: on the contrary, Donovan makes no such claim and in fact had no intention of competitng with FTC. We place a great deal of importance on this relevation because examination of cases factually similar to the one at issue supports our belief that plaintiff must be *harmed* in relation to the market entered or potentially entered—*ie.*, the market the monopolist considers to be *threatened*. We now turn to three cases that speak for this view.

In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), a regulated utility company had a virtual monopoly on the retailing of electric power to 465 towns in a three state area. Some of these towns were permitted to establish their

17 Tr. 398.

own "municipal systems" for direct power distribution to local consumers. Each of these towns would then become a competitor of Otter Tail inasmuch as each municipal system would retail the electricity to its own citizenry. To become power retailers each town had to purchase electricity at wholesale which necessitated the *interconnection* of their respective systems with existing transmission lines. Otter Tail was the only party with existing transmission lines and it refused to sell energy to the municipal systems at wholesale. It also refused to "wheel" (deliver) power from other wholesale suppliers.

After ruling that Otter Tail was not immune from antitrust regulation the Court stated:

> The record makes abundantly clear that Otter Tail *used its monopoly power* in the towns in its service area to *foreclose competition or gain a competitive advantage, or to destroy a competitor,* all in violation of the antitrust laws. See *United States v. Griffith,* 334 U.S. 100, 107. * * * Use of monopoly power "to destroy threatened competition" is a violation of the "attempt to monopolize" clause of §2 of the Sherman Act. *Lorain Journal v. United States,* 342 U.S. 143, 154; *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 375.

Otter Tail, supra at 377. (Emphasis added.) Clearly Otter Tail's use of monopoly power had an anticompetitive *effect* on the relevant market it monopolized.

The second case, *Lorain Journal Co. v. United States,* 342 U.S. 143 (1959), is different in two respects. Here it was determined that 1) the defendant refused to deal with third parties and 2) such conduct did not preclude but seriously undermined competition. A newspaper publisher owning

the only daily newspaper in Lorain, Ohio had a monopoly on merchant advertising in that city. Quite naturally the publisher became miffed when a local concern was granted FCC permission to establish a radio station which, in addition to broadcasting news, disseminated advertisements similar to those published by the Journal. Thus, when many of the Journal's customers also began to advertise over the radio station, the publisher reacted by refusing to accept local advertising from any party using the radio station for local advertising. Significantly the High Court notes that—

> [b]ecause of the Journal's complete daily newspaper monopoly of local advertising in Lorain and its practically indispensable coverage of 99% of the Lorain families, this practice *forced numerous advertisers to refrain from using WEOL [the station] for local advertising.* That result not only reduced the number of customers available to WEOL in the field of local Lorain advertising and strengthened the Journal's monopoly in that field, but more significantly tended to *destroy and eliminate* WEOL altogether.

Lorain Journal, supra at 149-50. (Emphasis added.) The Court held that such conduct constituted a violation of the "monopolization" and "attempt" provisions of §2. Note that while the publisher refused to deal, not with the station but with the competitors' mutual customers, such conduct did amount to action which at least severely lessened the agency's ability to compete with the publisher.[18] *See Eastman Kodak Co. v. Southern Photo Materials Co., supra,*

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18 This was due to the fact that WEOL derived almost all of its income from advertising. *Lorain Journal, supra* at 148.

where the same effect obtained when the monopolist refused to deal with the competitor reasonably.

The Fifth Circuit's most enlightening refusal to deal case is *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F. 2d 478 (5 Cir. 1966). This case involved a television station which broadcasted commercial advertising in certain parts of Florida and Alabama. Being the only TV station in Pensacola, Florida it had a natural monopoly on all advertising desired for transmission over video airwaves within its broadcast limits. Prior to plaintiff's entering the advertising business defendant aired commercials prepared either by it or the three licensed advertising agencies it recognized in Pensacola. For those commercial slots handled, but not directly prepared and sold, by the station a 15% commission was paid to the referral agency making the placement.

After plaintiff commenced operation a local mobile home business, which had previously advertised directly through the station, employed the plaintiff as its advertising agency. The station, in refusing to recognize the plaintiff as a qualified agency, foreclosed the attempt to have a commercial aired by agency placement. In reversing the district court's granting of summary judgment for the station the appellate court held that the complaint did state a claim under §2. In reviewing what the plaintiff had alleged the court added a paragraph that, again, we feel has particular importance with respect to refusals to deal in the context of a §2 charge:

> The complaint further alleged that the standards set up by the defendant were for the express purpose of *preventing the plaintiff from engaging in the business of an advertising agency* and served to destroy

> competition by plaintiff and in fact rendered transaction of business by plaintiff impossible.

As can be seen by comparison with these cases, what *Six Twenty-Nine Productions, supra* at 481. (Emphasis added.) Thus the Court held that a §2 claim was made out where the refusal to deal prevented the plaintiff agency from competing with the TV station in the commercial preparation market.

Donovan has proven does not measure up to a violation under §2. In all three cases each refusal to deal was determined to be a use of monopoly power. Here the refusal to deal was not a use of monopoly power simply because it did not—and could not—have the effect of excluding competition. Significantly, in all three cases the defendants' refusal to deal *resulted* either in the target competitor's being rendered unable to compete (*Otter Tail* and *Six Twenty-Nine*) or seriously weakened in its ability to compete (*Lorain Journal*)[19] with the respective defendants in the relevant markets. Here Donovan was not—and could not be—precluded from competing with FTC.

Our assessment of this case is also compatible with established law which distinguishes between conduct that arguably fits within the statutory language and that which is truly actionable. *Cf. Credit Bureau Reports, Inc. v. Retail Credit Co.*, 476 F.2d 989, 992, *petition for rehearing denied*, 478 F. 2d 1402 (5 Circ. 1973) (*en banc*). It must be realized that we are dealing with a private plaintiff proceeding under §4 of the Clayton Act, 15 U.S.C. §15, for treble damages;

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19 In the case before us electrical construction was but one enterprise from which Donovan derived revenues the diminishing of which we find did not impair its ability to enter FTC's terminal equipment market.

thus, the anticompetitive effect wrought by the challenged conduct must cause harm to the litigant for which compensation is warranted. *See Credit Bureau Reports, supra* at 992. Plaintiff simply did not demonstrate that FTC's refusal to deal produced an anticompetitive impact which is redressable under §2 of the Sherman Act.

Accordingly, judgment shall be entered for defendant on the monopolization claims.

Findings of fact and conclusions of law have not been separately stated but are included in the body of the foregoing opinion as specifically authorized by 52 (a) of the Federal Rules of Civil Procedure.

An appropriate order shall be entered.

Dated: November 1st, 1976.

APPENDIX B

DONOVAN CONSTRUCTION COMPANY OF MINNESOTA, a corporation,

Plaintiff-Appelant,

vs.

FLORIDA TELEPHONE CORPORATION, a corporation,

Defendant-Appellee.

No. 76-4428.

United States Court of Appeals, Fifth Circuit.

Dec. 22, 1977.

Antitrust action was brought charging that corporate defendant had monopolized or attempted to monopolize interconnect business. The United States District Court for the Middle District of Florida, John L. Miller, J., entered a judgment in favor of defendant, and plaintiff appealed. The Court of Appeals held that plaintiff which did not deal in market where alleged antitrust violation occurred or intend to enter such market did not have standing to sue under antitrust laws.

Affirmed.

1. Monopolies—28(1.6)

To have standing to sue for treble damages under Clayton Act, plaintiff must have suffered an injury of type antitrust laws were intended to prevent. Sherman Anti-Trust Act, §2, 15 U.S.C.A. §2; Clayton Act, §4, 15 U.S.C.A. §15.

2. Monopolies—28(1.6)

To have standing to sue for trebel damages under Clayton

Act for antitrust violation plaintiff must be within sector of economy threatened by breakdown in competitive conditions. Sherman Anti-Trust Act, §2, 15 U.S.C.A. §2; Clayton Act, §4, 15 U.S.C.A. §15.

3. Monopolies—28(1.6)

Plaintiff which did not deal in market where alleged antitrust violation occurred or intend to enter such market did not have standing to sue under antitrust laws for damages for alleged antitrust violation Sherman Anti-Trust Act, §2, 15 U.S.C.A. §2; Clayton Act, §4, 15 U.S.C.A. §15.

Appeal from the United States District Court for the Middle District of Florida.

Before JONES, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

In this antitrust case, the defendant, Florida Telephone Corporation (FTC), provides telephone service to a central Florida region. FTC also sells terminal telephone equipment in its region. This is sometimes called the "interconnect business." The plaintiff, Donovan Construction Company engages in many businesses. For 2 1/2 years Donovan provided FTC with electrical construction services, but shortly after Donovan decided to enter the interconnect business in another region of Florida FTC terminated their relationship. Donovan sued under the antitrust laws for the damage it suffered in its electrical construction business, arguing among other things that FTC had monopolized or attempted to monopolize the interconnect business. 15

U.S.C. §2.[1] The parties stipulated that FTC's region was a relevant market for the interconnect business, and the district court found that Donovan did not intend to enter that market. We hold that Donovan lacks standing to sue under the antitrust laws.

[1-3] To have standing to sue for treble damages under Clayton Act §4, 15 U.S.C. §15, a plaintiff must have suffered an injury of the type the antitrust laws were intended to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). We have required that the plaintiff must be within the target area. That is, the plaintiff must be within the sector of the economy threatened by a breakdown in competitive conditions. *Tugboat, Inc. v. Mobile Transportation Co.*, 534 F.2d 1172 (CA5, 1976); *Southern Concrete Co. v. U.S. Steele Corp.*, 535 F.2d 313 (CA5, 1976); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (CA5, 1975); *Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39 (CA5, 1974); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (CA5, 1967). The alleged antitrust violation threatened the interconnect business in FTC's region. Because Donovan did not in any way deal in that market, or intend to do so, Donovan was not within the sector of the economy threatened by the alleged violation.

The judgment of the district court is AFFIRMED.

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1 Donovan has limited its appeal of the district court's judgment in favor of FTC to the claims of monopolization or attempted monopolization.